Supreme Court, U.S.
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No. 05-1631

In The
Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether Respondent can show that his Fourth Amendment rights were violated when Petitioner used deadly force to terminate a police pursuit by ramming Respondent's vehicle at a time when he posed no immediate threat to human life, and when Respondent was merely a fleeing traffic offender who was not violently resisting apprehension at any time during the course of the pursuit.

II. Whether clearly established law in 2001 gave fair warning to a reasonable police officer that it is a Fourth Amendment violation to use deadly force to terminate a pursuit by ramming the vehicle of a fleeing traffic offender at a time when the offender poses no immediate threat to human life, and when the offender is merely fleeing and has not violently resisted apprehension at any time during the course of the pursuit.

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JURISDICTIONAL STATEMENT

Respondent Victor Harris denies that the Court has jurisdiction over this case as Petitioner Timothy Scott is clearly attempting to argue the evidentiary sufficiency of the factual findings made by the District Court and affirmed by the Court of Appeals. Because the District Court's and the Court of Appeals' denial of qualified immunity turned upon the determination that there were facts requiring jury resolution, this case did not qualify for immediate review under *Mitchell v. Forsyth*, 421 U.S. 511 (1985) and *Johnson v. Jones*, 515 U.S. 304, 319-320 (1995).

On September 25, 2002, the District Court entered an Order denying Scott's motion for summary judgment based on qualified immunity. (J.A. 38-64). In denying Scott's motion, the District Court expressly determined that genuine issues of material fact exist which must be resolved by the jury regarding Scott's entitlement to the defense of qualified immunity as a matter of law. (J.A. at 46-51). On appeal, the Court of Appeals[1] affirmed the District Court's finding that genuine issues of material fact exist which preclude Scott's entitlement to qualified immunity as a matter of law. (J.A. at 66-68, 76-79).

Scott's overriding argument on appeal is that the District Court erred in finding that genuine issues of material fact exist which preclude summary judgment on the basis of qualified immunity. *See, e.g.*, Petitioner's Brief, pp. 23-24. Scott's attempt to argue the evidentiary

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[1] In the Court of Appeals, Respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Request for Jurisdictional Question under 11th Cir. R. 31-[illegible]r, Alternatively, for Extension of Due Date for Appellee's Brief which were denied.

sufficiency of the record on interlocutory appeal is clearly prohibited by *Johnson v. Jones*, supra, which held as follows:

> This case concerns government officials – entitled to assert a qualified immunity defense in a "constitutional tort" action – who seek an immediate appeal of a district court order denying their motions for summary judgment. The order in question resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial. We hold that the defendants cannot immediately appeal this kind of fact-related district court determination.

515 U.S. at 307.

> [A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of material fact for trial.

Id. at 319-320.

The Court affirmed this principle in *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998):

> We also declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency.

It is clear from his brief that Petitioner Scott fails to appreciate not only the standard under which the evidentiary record must be viewed on a motion for summary judgment, but also the proper basis for interlocutory appellate jurisdiction. Instead, Scott attempts to re-argue the material facts determined by the District Court and affirmed by the Court of Appeals in an attempt to manufacture a "hazy border" under which he can claim the protection of qualified immunity. Such an attempt to question the evidentiary sufficiency of the factual findings of the District Court is clearly prohibited in an interlocutory appeal from a denial of qualified immunity. Because Scott fails to accept the facts in the record in the light most favorable to Harris and is simply arguing the evidentiary sufficiency of the factual findings made by the District Court, the Writ of *Certiorari* should be dismissed as improvidently granted.

STATEMENT OF THE CASE

To the extent that the Court reaches the merits of Scott's appeal, F.R.C.P. 56 requires that the evidence on summary judgment be viewed in the light most favorable to Harris. Putting aside Scott's shading of the record and viewing the evidence in its proper light, the following facts must be taken as true for purposes of this appeal:

On March 29, 2001, at approximately 10:42 p.m., Deputy Clinton Reynolds of the Coweta County Sheriff's Department (CCSD) was stationed on Highway 34 when he clocked Harris' vehicle traveling 73 mph in a 55 mph zone. (R. 49 at 72-73, 75). Deputy Reynolds flashed his blue lights to attempt to get Harris to slow down. (*Id.* at

73, 75). Deputy Reynolds testified that if Victor Harris had slowed down, Deputy Reynolds would not have even initiated a traffic stop. (*Id.* at 77). As Harris' vehicle passed by Deputy Reynolds' police car, it "was still doing seventy three miles per hour." (*Id.* at 73-77). Based solely on the traffic offense of speeding 73 mph in a 55 mph zone, Deputy Reynolds decided to pursue Victor Harris. (*Id.*)

Shortly after commencing the pursuit, Deputy Reynolds obtained Harris' vehicle's license plate number and broadcast this information to his dispatcher. (R. 49 at 81-83). The vehicle that Victor Harris was driving was registered in his name and at his proper address. (R. 45, Res. Sta. Facts – Ex. A). However, Deputy Reynolds failed to broadcast any information concerning the underlying charge that precipitated the pursuit (which was speeding). (R. 48 at 116-117, 159-160; R. 50 at 34-37). Scott neither knew nor requested any information pertaining to the underlying basis for the pursuit until the pursuit was concluded. (*Id.*)

Pursuant to the CCSD's pursuit policy, officers should not have engaged in this pursuit as the offense which precipitated the pursuit was only speeding and they had Harris' license plate number which would have allowed the officers to apprehend Harris at a later date. (R. 45, Aff. Alpert at 11-12). At some point during the pursuit, Deputy Reynolds' dash-mounted video camera activated.[2] (R. 49 at

[2] There are four police videotapes which captured portions of the pursuit. The video recorders in the officers' patrol cars record automatically once the emergency equipment is activated. There are two videotapes from CCSD deputies: 1) Deputy Reynolds (#78) and Petitioner Scott (#66). These videotapes were attached to Scott's Motion for Summary Judgment as Exhibit A. (R. 36). The videotapes made by Peachtree City officers, Officer Ercole and Sgt. Brown, were copied onto

(Continued on following page)

77-70; R. 36, Ex. A – Video). The pursuit began in Coweta County, Georgia and ended at Peachtree City in Fayette County, Georgia near Harris' home.

Despite not being requested to join the pursuit and having no information regarding the basis for the pursuit, Scott unilaterally decided to assist Deputy Reynolds in his pursuit of Harris. (R. 49 at 82; R. 48 at 116-118, 159-160). In Scott's overzealousness to join the pursuit, it appears that he drove his patrol car at speeds well over 100 mph and actually forced motorists off the road. (R. 36, Ex. A – Video).

After Harris entered Peachtree City, Harris slowed his vehicle, turned on his blinker and entered an empty drug store parking lot. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). When Harris turned into the parking lot, there were two Peachtree City Police Department (PCPD) officers in their squad cars in the parking lot. (R. 46 at 7). The Peachtree City officers were not informed that a pursuit was heading into their jurisdiction. (R. 46 at 11-12). This is important because Peachtree City police officers are equipped with "stop sticks" which can be placed across the roadway to flatten a vehicle's tires slowly to safely terminate a pursuit. (R. 46 at 15-16). Had the PCPD been apprised of the pursuit, they could have attempted to deploy the stop sticks. (R. 46 at 14-16). Deputy Reynolds followed Harris into the parking lot. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). Harris drove through the parking lot towards Highway 74. (*Id.*) As

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a single videotape and attached to Harris' Response to Scott's Statement of Material Facts as Exhibit D. (R. 45). On the videotape containing the videos from the PCPD, Officer Ercole's video is first followed by Sgt. Brown's video.

Harris was traveling through the parking lot, there was no vehicular or pedestrian traffic present that would have been endangered by the pursuit. (*Id.*) Scott was traveling too fast to make the turn into the parking lot. (R. 49, Ex. 6).

After missing the entrance to the parking lot, Scott turned right at the next corner and sped around the other side of the parking lot, where he attempted to block Harris from exiting onto Highway 74 by driving his vehicle directly into the path of Harris' vehicle. (R. 36, Ex. A – Video; R. 45, Ex. D – Video; R. 49 at 91, 97, Ex. 6; R. 48 at 175, Ex. 1). Peachtree City officers were not involved in any manner in attempting to stop Harris from exiting the parking lot. (R. 46 at 14-16, 19-20).

As Harris was attempting to exit the parking lot onto Highway 74, Scott drove his vehicle directly into Harris' lane of traffic. (R. 36, Ex. A – Video). The police videos indicate that: 1) Scott drove his vehicle directly into Harris' lane of traffic; 2) Harris turned his vehicle to the left to avoid contact with Scott's vehicle; 3) Scott turned his police vehicle to the right in an effort to "box in" Harris; and 4) minor contact occurred between Harris' and Scott's vehicles. (*Id.*; R. 49 at 91, 97, Ex. 6; R. 48 at 175, Ex. 1). Peachtree City's Sgt. Brown observed this incident and noted in his official report that he saw "one Coweta County unit ram the Cadillac." (R. 46, Ex. 1).

After the pursuit left the parking lot, Sgt. Brown and the PCPD officers did not join the pursuit because they were not informed of the underlying reason for the pursuit. (*Id.* at 4-16). Sgt. Brown testified that a pursuit for a speeding violation would be in violation of the PCPD Pursuit Policy which only allows pursuits for violent

felonies. (*Id.* at 42-43; R. 56, Ex. 6). After leaving the parking lot, the Peachtree City police officers simply followed the pursuit from a distance in an effort to assist the pursuing officers and clear the intersections in the path of the pursuit. (R. 56 at 13; R. 46 at 13-16; R. 47 at 8-10, 22-23). Sgt. Brown ordered his fellow Peachtree City officers to block all intersections on the pursuit route. (R. 46 at 13, 14-16, 19-20). The Peachtree City police officers followed Sgt. Brown's orders and immediately blocked off the intersections on the pursuit route which significantly reduced any danger from the pursuit.

After the pursuit left the parking lot, Scott requested to be the primary pursuing unit stating over the radio, "Let me have him 78 [Reynolds], my car's already tore up."[3] (R. 36, Ex. A – Video at 22:47:22). Scott then took over as the lead pursuing vehicle by passing both Deputy Reynolds and PCPD Officer Ercole. After becoming the lead pursuing vehicle, Scott requested permission from his supervisor, Sgt. Fenninger, to use a PIT maneuver[4] on Harris. (R. 48 at 142-144; R. 50 at 54-55).

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[3] Harris denies that Scott's vehicle was "tore up" as there was little, **if any**, visible damage to his vehicle. (R. 48, Ex. 13).

[4] The Court of Appeals' opinion notes that the PIT maneuver is " 'a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point of the vehicle, which throws the car into a spin and brings it to a stop.' This definition assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight 'safely.' *See e.g.*, Geoffrey Alpert's Expert Report, R. 24 at 5 (stating that the PIT requires a set of defined circumstances in order for it to be performed safely (i.e., at low speed on wide straightaways, on dry pavement by a properly trained driver)); National Law Enforcement and Corrections Technology Center Bulletin, U.S. Department of Justice, October 1996, at 4-5 (stating that the PIT 'is not applicable in every situation, the key to its effective use

(Continued on following page)

Significantly, neither Scott nor Sgt. Fenninger had any training on the use of the PIT maneuver. (R. 48 at 137-139). Scott claims that he learned about the PIT maneuver by talking informally with other members of the CCSD who had received the training prior to this incident (R. 49 at 137-141). However, this testimony is disputed because Sheriff Yeager confirmed that no one from the CCSD had been trained or certified in the use of the PIT maneuver prior to this incident. (R. 54 at 49-50). Scott's own expert, Michael Brave, testified that a PIT maneuver cannot be used at speeds of 80-100 mph and that there is no question that Scott did not attempt a PIT maneuver on Harris. (R. 57 at 198, 201-202).

Sgt. Fenninger was monitoring a different radio frequency when the pursuit began. (R. 50 at 31). After another officer advised Sgt. Fenninger of the pursuit, Sgt. Fenninger began to monitor the pursuit. (*Id.* at 31-33). Sgt. Fenninger responded to Scott's request for permission to PIT by stating over the radio, "Go ahead and take him out. Take him out." (R. 36, Ex. A – Video at 22:47:50; R. 50 at 54-55). Sgt. Fenninger testified that when he told Scott to "take out" Mr. Harris, Sgt. Fenninger was authorizing Scott to use *deadly force* to terminate the pursuit. (R. 50 at 62-63). After Sgt. Fenninger told Scott to "take out" Harris, Deputy Reynolds broadcast over the radio, "We're running about 90 now, we got several Peachtree City units

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is to carefully choose a favorable stop before attempting PIT and to first consider the possible effects on other traffic and pedestrians'); National San Diego Department Use of Force Task Force Recommendations, Executive Summary at 37 ('Utilized at speeds of 35 mph or less, the PIT maneuver improves officer and public safety by removing the threat of pursuit as quickly and safely as possible'.)" *Harris v. Coweta County*, 433 F. 3d 807, 816-817 (11th Cir. 2005). (J.A. at 80).

blocking our road." (R. 36, Ex. A – Video at 22:48:02; R. 49 at 111-112).

At the time of the above referenced transmissions, the pursuit was traveling southbound on Highway 74. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). At this point, Highway 74 is a two-lane highway without a shoulder and with steep embankments or culverts on either side of the road. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). At the time of the pursuit, the road was wet. (R. 48 at 193). Scott judicially admits that there were no motorists in the area who were in danger from the pursuit. (J.A. at 8-9, 28-30)

Despite these conditions, Scott sped up his patrol car and rammed it into Harris' vehicle. (R. 36, Ex. A – Video; R. 48 at 143). It is undisputed that Scott did not perform a PIT maneuver, and that he could not have performed a PIT maneuver under these conditions even if he had received PIT training. (R. 48 at 143; R. 57 at 198, 201-202; R. 49 at 123). It is probable that Scott never attempted to perform a true PIT maneuver since he was never trained in its application. To any objectively reasonable officer trained in the PIT maneuver, it would have been readily apparent that it could not be performed under the circumstances: i.e., while traveling at high speeds on a wet, two-lane highway with no shoulders, and with deep culverts or embankments on each side. As a result of being rammed by Scott, Harris' vehicle left the roadway and flew off an embankment, flipped and came to rest against a telephone pole, causing severe and permanent injuries to Victor Harris. (R. 36, Ex. A – Video; R. 45, Ex. D – Video; R. 50 at 54-55).

Immediately after Scott rammed Harris' vehicle, Deputy Reynolds notified dispatch that "it's going to be a

bad 10-50 [car accident], get them to start an ambulance." (R. 36, Ex. A – Video). Sgt. Mark Brown of the PCPD was following the pursuit and arrived on the scene within seconds of the wreck. Sgt. Brown's initial reaction to Scott's ramming of Harris illustrates the egregiousness of this conduct to a reasonable police officer. Upon witnessing the ramming, Sgt. Brown exclaimed into his microphone: "Jesus Christ, what the . . . ?" (R. 45, Ex. D – Video at 22:49:00) and "Fucking, they rammed him!" (*Id.* at 22:49:14). Shortly thereafter, the tape indicates that either Scott or Deputy Reynolds thanked Sgt. Brown for stopping all traffic on the pursuit route. (*Id.* at 22:52:49). Thereafter, an unidentified officer is heard saying: "Damn brother, that was fucking cool." (*Id.* at 22:53:24).

After this incident, Deputy Reynolds filled out an incident report listing the charges to be placed against Harris as: 1) speeding – 73 mph in 55 mph zone; 2) speeding – 100+ mph in a 55 mph zone; and 3) fleeing and eluding police. (R. 49, Ex. 6). No other crimes or offenses were listed on the incident report. Thereafter, Deputy Reynolds signed and filed an Application for Criminal Arrest Warrant for: 1) speeding – 73 mph in a 55 mph zone (R. 49, Ex. 4); 2) fleeing and attempting to elude (R. 49, Ex. 5); and 3) reckless driving (R. 49, Ex. 6). No additional Applications for Criminal Arrest Warrants were signed or filed by Deputy Reynolds. Despite the fact that warrants were issued for these traffic violations, Harris was never prosecuted for these or any other offenses.

While Harris admits that he violated traffic laws during the pursuit, Harris denies that he drove in such a reckless manner as pose a clear and present danger to the public as he was in control of his vehicle until it was rammed off the road by Scott. (R. 36, Ex. A – Video; R. 45,

Ex. D – Video). During the course of the pursuit, Harris did pass some vehicles on a double yellow line in violation of the traffic laws. (*Id.*) However, at least eight (8) times during the pursuit, Harris utilized his blinkers while passing or making turning movements. (*Id.*) Harris admits he ran a red light at the intersection of Highway 34 and Fisher Road. (*Id.*) However, there were no vehicles attempting to cross the intersection when he proceeded through it. While Harris exceeded the speed limit during the pursuit, Harris stayed in control of his vehicle. (*Id.*) After entering Peachtree City, Sgt. Brown ordered his officers to block intersections on Highway 74 which significantly diminished the risks to the public. Harris slowed his vehicle at the intersection of Highway 74 and Kelly or Crosstown. (*Id.*) After this intersection, there were no other motorists in the path of the pursuit. (J.A. at 8-9, 28-30; R. 48 at 147, Ex. 1; R. 49 at 121-123; R. 47 at 28, 47; R. 50 at 60). Significantly, at no time during the course of the pursuit did Harris ever use his vehicle offensively in an attempt to assault or strike the officers or any other motorist. (R. 36, Ex. A – Video; R. 45, Ex. D – Video).

Incredibly, Scott argues in his brief that reasonable officers would not have known that ramming a vehicle at 90 mph on a wet, narrow, two-lane road bordered by deep culverts and steep embankments constituted the use of deadly force. This argument defies logic and common sense and illustrates Scott's flagrant disregard for the factual record. His own department's Use of Force Policy provided a clearly understandable definition of "deadly force," stating as follows: "Force which, under the circumstances in which it is used, is readily capable of causing death or other serious injury is considered deadly force." (R. 48, Ex. 12). Furthermore, the CCSD Use of Force

Policy provides that "Facts unknown to a Deputy, no matter how compelling, cannot be considered in later determination whether the use of lawful force, particularly deadly force, was justified." (*Id.*) Based on this objective definition, Scott's conduct was an obvious use of deadly force, because it cannot be disputed that ramming a vehicle at high speeds is "capable of" causing death or serious injury. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120; R. 47 at 37-40). In fact, this conduct is not only "capable of" causing death or serious bodily injury, but is almost certain to cause death or serious bodily injury. (*Id.*)

Further, Scott unequivocally testified that: 1) he knew that a police vehicle can be used as an instrument of deadly force (R. 48 at 18-22); 2) when he rammed Harris' vehicle, he knew that it was likely that Harris would be injured or killed (R. 48 at 157); and 3) when he rammed Harris' vehicle, he was utilizing deadly force. (R. 48 at 158). More importantly, all members of the CCSD who were questioned about whether Scott's use of his patrol car to ram Harris' vehicle constituted deadly force clearly testified that this conduct amounted to the use of deadly force. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120). Even Scott's expert, Mr. Brave, acknowledged in an article he authored that deliberately ramming a vehicle at high speed constitutes deadly force. (R. 57 at 171-172; R. 45, Ex. B – "What is a Good Pursuit").

As previously noted, it is judicially admitted that Scott's ramming of Harris' vehicle occurred at a time where there were no other motorists in the area. (J.A. at 8-9, 28-30). As Harris posed no immediate threat to the officers or others, the use of deadly force against Harris was objectively unreasonable and violated long-standing

and clearly established law. (R. 45 – Aff. Alpert at 11; R. 47 at 34-35; R. 57 at 171-172; R. 45, Ex. B – "What is a Good Pursuit").

SUMMARY OF ARGUMENT

If the Court determines that the merits of Scott's appeal can be reached, it is clear that this case must be analyzed under the factual record set forth by Harris herein as found by both the District Court and Court of Appeals. Based on a proper analysis of the record, Harris submits that both the District Court and Court of Appeals properly found that genuine issues of material fact exist regarding whether Scott is entitled to summary judgment. The sole issue presented in the merits of this appeal is whether the District Court and the Court of Appeals correctly held that Scott, who admittedly used deadly force against a fleeing traffic offender who did not pose an immediate threat to human life, is not entitled to qualified immunity as a matter of law.

All police officers who testified on the issue acknowledge that deadly force was used against Harris at a time when Harris admittedly posed no immediate threat to any human life. In short, the extraordinary factual record in this case not only authorizes, but demands, a finding that Scott used excessive force in violation of Harris' Fourth Amendment rights. To hold otherwise would immunize from constitutional liability all law enforcement officers who knowingly apply deadly force in circumstances when no life is in immediate danger in order to seize a fleeing traffic offender. Such a grave intrusion into a citizen's constitutional right to be free from the use of excessive

and deadly force under the Fourth Amendment has never been tolerated and violates this Court's clearly established precedent and common sense.

This case is governed by a trilogy of decisions by this Court that gave "fair warning" that the conduct which occurred in the case was unconstitutional in the year 2001, and those decisions were correctly applied by the courts below. In the landmark case of *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that a police officer who uses deadly force to seize a fleeing felony suspect who "poses no immediate threat" to human life violates the Fourth Amendment. 471 U.S. at 9-10. In this case, Victor Harris was a teenaged, fleeing traffic offender, not a fleeing felon, so the Court's reasoning in *Garner* is even more compelling.

Garner's focus upon reasonableness was expanded by *Graham v. Connor*, 490 U.S. 386 (1989), which held that all claims resulting from the use of force against a suspect eluding capture – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. 490 U.S. at 388. In short, *Graham* requires what was implicit in *Garner*: that the force used be proportional to the threat. Unless the suspect is posing an immediate threat to human life, there is no justification for the use of force which is likely to kill or cause serious injury to the suspect.

In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court applied these principles to the use of vehicles to seize a fleeing suspect, clearly establishing that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied" – regardless of whether the "means intentionally

applied" are a bullet, a fist, or a deliberate high-speed collision. 489 U.S. at 597.

The above referenced trilogy of cases applies to the facts of the instant case with obvious clarity and provides Scott with more than adequate notice that his conduct violated clearly established law. Furthermore, the analysis of these cases by the lower courts in high-speed pursuit cases serves to further clarify that these holdings apply with obvious clarity to the instant case.

ARGUMENT

In determining whether a state actor is entitled to qualified immunity, the Court undertakes a two-step inquiry. The Court first determines whether the facts alleged, taken in the light most favorable to the plaintiff, show that the government official's conduct violated a constitutional right. If a violation can be made out, the Court then asks whether that right was clearly established. *See Saucier v. Katz*, 533 U.S. 194 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). All that is required is that "in the light of pre-existing law, the unlawfulness must be apparent." *Id.* The law can be clearly established where a "general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question." *United*

States v. Lanier, 520 U.S. 259, 271 (1997). In determining whether the law is clearly established, "the salient question . . . is whether the state of the law [at the time of the alleged conduct] gave [officials] fair warning that their alleged [conduct] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

I. A proper view of the record shows that Respondent's Fourth Amendment rights were violated when Petitioner used deadly force to terminate a police pursuit by ramming Respondent's vehicle at a time when he posed no immediate threat to human life, and when Respondent was merely a fleeing traffic offender who was not violently resisting apprehension at any time during the course of the pursuit.

The first step of *Saucier's* two-part analysis requires the plaintiff to establish a constitutional violation. To determine whether a seizure violates the Fourth Amendment, this Court has long required a balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983). Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

In the landmark case of *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court applied this balancing test in holding that the Fourth Amendment is violated when a police officer uses deadly force to seize a fleeing felony suspect

who "poses no immediate threat" to human life. *Id.* at 9-10.

> The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment . . .
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> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no **immediate** threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

Id. at 9-10 (emphasis added).

The Court in *Garner* did recognize that limited circumstances might justify the use of deadly force, to wit: (1) "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or "if the suspect threatens the officer with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm," **and** (2) if deadly force is "necessary to prevent escape," **and**, (3) "if,

where feasible, some warning has been given." *Id.* at 11-12. Without meeting all of these conditions, the use of deadly force is constitutionally unreasonable.

According to *Garner*, police may not use deadly force to apprehend a fleeing felon unless the suspect poses an **immediate** threat to the life of the officer or some other person. It is essentially a "defense of life" standard. (R. 45 – Alpert Aff. at 7). Scott acknowledges that *Garner* establishes a bright-line rule regarding deadly force applications noting that, "*Garner* applies in special circumstances when it is clear that the force used by an officer amounts to deadly force. In that context, *Garner* accurately translates the general requirement of reasonableness into a specific constitutional rule. However, *Garner*'s special rule is not useful when the question of deadly force is open and unclear." (Petitioner's Brief, pp. 13-14).

In order to avoid complying with the *Garner* preconditions in evaluating whether Scott violated Harris' constitutional rights, Scott simply attempts to argue that Scott, or any reasonable officer for that matter, should not have known that ramming a vehicle at ninety (90) mph constitutes deadly force. The argument that neither Scott nor any objectively reasonable officer would understand that ramming a vehicle at 90 mph is the use of deadly force is a distortion of the record and an affront to any reasonable law enforcement officer. This specious argument lies at the heart of Scott's attempt to manufacture a "hazy border" under which he can claim the protection of qualified immunity, but the facts of this case are clearly governed by the rule set forth in *Garner*.

While *Garner* did not define "deadly force," it is clear that its holding is not limited to firearms but applies to all

applications of deadly force. A survey of the Circuits, including the court below, shows that deadly force has been uniformly defined as any use of force which creates a substantial likelihood of causing death or serious bodily injury.[5] The uniformity of this definition is reinforced by the fact that it has been widely adopted by modern police agencies, and indeed, Scott's agency, the CCSD, defined deadly force in precisely this manner. (R. 48, Ex. 12).

Under this objective definition, Scott's ramming of Harris' car was clearly the use of deadly force since it was substantially certain that death or serious bodily injury would result from contact between the vehicles at high speed, and the testimony in the record is unanimous on that point. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120; R. 47 at 37-40). Scott unequivocally testified that: 1) he knew that a police vehicle can be used as an instrument of deadly force (R. 48 at 18-22); 2) when he rammed Harris' vehicle, he knew that it was likely that Harris would be injured or killed (R. 48 at 157); and 3) when he rammed Harris' vehicle, he was utilizing deadly force. (R. 48 at 158). More importantly, all members of the CCSD who were questioned about whether Scott's use of his patrol car to ram Harris' vehicle constituted deadly force clearly testified that this conduct

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[5] *See, e.g., Pruitt v. City of Montgomery*, 771 F. 2d 1475, 1479 n. 10 (11th Cir. 1985); *Gutierrez v. City of San Antonio*, 139 F. 3d 441, 446 (5th Cir. 1998); *Estate of Phillips v. City of Milwaukee*, 123 F. 3d 586, 593 (7th Cir. 1997); *In re City of Philadelphia Litigation*, 49 F. 3d 945, 966 (3rd Cir. 1995); *Ryder v. City of Topeka*, 814 F. 2d 1412, 1416 n. 11 (10th Cir. 1987); *Robinette v. Barnes*, 854 F. 2d 909, 912 (6th Cir. 1988); *Mattis v. Schnarr*, 547 F. 2d 1007, 1009 n. 2 (8th Cir. 1976) (*en banc*), *vacated as moot sub nom., Ashcroft v. Mattis*, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977).

amounted to the use of deadly force. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120). Even Scott's expert, Mr. Brave, acknowledged in an article that deliberately ramming a vehicle at high speed constitutes deadly force. (R. 57 at 171-172; R. 36, Ex. B – "What is a Good Pursuit").

Garner's focus upon reasonableness was expanded in *Graham v. Connor*, 490 U.S. 386 (1989), which held that all claims resulting from the use of force against a suspect eluding capture – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. 490 U.S. at 388.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, [Cite omitted] however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an ***immediate*** threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8-9.

Id. at 396 (emphasis added). In short, *Graham* requires what was implicit in *Garner*: that the force used be proportional to the threat. Unless the suspect is posing an immediate threat to human life, there is no justification for the use of force which is likely to kill or cause serious injury to the suspect.

Finally, in *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court addressed whether a suspect fleeing from police who runs into a "deadman's roadblock" was "seized" under the Fourth Amendment. In holding that a

police officer's use of an automobile to create a roadblock to stop a fleeing suspect constituted a "seizure," the Court noted that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied" – regardless of whether the "means intentionally applied" is a bullet, a fist, or a deliberate high-speed collision. *Id.* at 597. *Brower* distinguished the case of a deliberate collision amounting to a seizure from the typical automobile negligence claim as follows:

> Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. ***If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.***

Id. at 596-597 (emphasis added).

Brower summarily discarded the argument that Brower's flight from police precluded a finding that that Brower was subjected to a Fourth Amendment seizure:

> While acknowledging *Garner*, the Court of Appeals here concluded that no "seizure" occurred when Brower collided with the police roadblock because "[p]rior to his failure to stop voluntarily, his freedom of movement was never arrested or restrained" and because "[h]e had a number of opportunities to stop his automobile prior to the impact." 817 F. 2d, at 546. Essentially the same thing, however, could have been said in *Garner*. ***Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of***

> ***his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.***

Id. at 595 (emphasis added).

Since the 1980's, this trilogy of Supreme Court rulings has defined the contours of the Fourth Amendment in use of force cases. Based on these decisions, it is clear that:

1) The Fourth Amendment is violated when a police officer to uses deadly force to seize a fleeing suspect who "poses no immediate threat" to human life. *Garner*, 471 U.S. at 9-10.

2) All claims resulting from the use of force against a suspect – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. *Graham*, 490 U.S. at 388.

3) In analyzing the objective reasonableness of use of force against a suspect, the force must be proportional to the threat. *Id.* at 396.

4) A seizure occurs whenever there is a governmental termination of freedom of movement through means intentionally applied. *Brower*, 489 U.S. at 596. The use of a police vehicle to sideswipe or ram a vehicle causing it to crash is a seizure which must meet the objective reasonableness standard of the Fourth Amendment. *Id.* at 597.

5) A suspect's flight from police officers does not reduce or eliminate an officer's responsibility for

acting reasonably when seizing a suspect. *Id.* at 595.

In applying these bedrock constitutional principles to the case at bar, it is clear that Scott violated Harris' constitutional rights under the Fourth Amendment when the record is viewed in the light most favorable to Harris. Scott's contention that there are no genuine issues of material fact as to whether Scott's conduct violated Harris' constitutional rights completely disregards both the record and the factual findings of the District Court.

Despite Scott's argument to the contrary, the undisputed proof in the record indicates that Scott's ramming of Harris was an application of deadly force as it was obvious that this conduct may cause death or serious bodily injury. As such, the *Garner* pre-conditions for the use of deadly force must be considered. Under *Garner*, deadly force could not be utilized against Harris unless: 1) Harris posed an immediate threat to officers or others; or there was probable cause to believe Harris committed a crime involving the infliction, or threatened infliction, of serious physical harm; and 2) deadly force was necessary to prevent escape; and 3) a warning was given, if feasible.

Scott has judicially admitted that the application of deadly force was performed at a time when no other motorists were in the area and Harris was driving away from Scott. Thus it is clear that neither Scott nor any third parties were in immediate danger at the time of the application of deadly force.

Moreover, the underlying crime which precipitated the pursuit was a traffic offense which is not a crime involving the infliction or threatened infliction of serious physical harm. In fact, Harris' crime was so minor that Deputy

Reynolds testified that he would not have even initiated a traffic stop if Harris had slowed down after he flashed his blue lights. The fact that traffic offenses are not considered serious enough to justify dangerous police activity is reflected in the growing trend in modern police departments that have specifically precluded high-speed pursuits of traffic offenders and restricted their use to violent felonies only.[6]

While Scott argues that Harris' conduct during the course of the pursuit created the necessity for the use of deadly force, both the District Court and Court of Appeals found, when viewing the record in the light most favorable to Harris, that Harris' conduct during the course of the pursuit did not entitle Scott to use deadly force to apprehend him because: 1) Harris stayed in control of his vehicle; 2) Harris never used his vehicle offensively as a weapon against the officers or anyone else; 3) Harris was not violently resisting, but simply attempting to flee; 4) Harris was driving away from Scott when deadly force was applied; and 5) at the time of the application of deadly force, there was no one in the immediate area who was endangered by Harris' flight. (J.A. 45-51; 70-90). Ignoring the record and taking Scott's argument to its illogical conclusion, Scott is arguing that deadly force may be used against any person who flees from the police in an automobile – failing to recognize that flight alone does not pose grave dangers to officers or the public in all cases.

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[6] Significantly, the CCSD adopted a "violent felony only" policy after this incident in 2002, thereby aligning itself with the majority of modern police departments. (R. 54, Exs. 4 & 7).

In addition, *Garner* mandates that deadly force only be utilized to apprehend a fleeing suspect when it is necessary. Since the officers had Harris' license plate number[7] and Scott had "personally observed Harris at very close range" (Petitioner's Brief, p. 19), deadly force was not necessary to apprehend Harris at a later time. Based on these facts, Scott could have clearly attempted to apprehend Harris at his home at a later date. Further, the factual record developed in this case clearly indicates that terminating the pursuit would substantially reduce any risks emanating from the pursuit. (R. 45, Aff. Alpert, pp. 7-8).[8] Under the facts of this case, the use of deadly force was not necessary to apprehend Harris and to diminish the risks of the pursuit to the public.

Scott mistakenly suggests that analyzing the case under *Graham* rather than *Garner* would result in a different outcome. *Graham* does not overrule the *Garner* pre-conditions to the use of deadly force but simply acknowledges what was implicit in *Garner*: that any use of force must be proportional to the threat. Under *Graham*, to evaluate whether an officer's use of force is reasonable, careful attention must be paid to the facts of each case which includes: the severity of the crime at issue, whether

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[7] Harris' vehicle was properly registered at his correct home address. (R. 45, Res. Sta. Facts – Ex. A).

[8] Scott implicitly acknowledges this fact in his brief stating, "It is true that police generally have the option of calling off the pursuit, which in some circumstances may lessen the risk." While implicitly acknowledging that termination would reduce the risks of the pursuit, the factual record fully supports this contention as Harris' expert, Dr. Geoffrey Alpert, has unequivocally testified that research has validated this theory and Scott's expert has failed to provide an opinion refuting this testimony. (R. 45, Aff. Dr. Alpert, pp. 7-8).

the suspect poses an **immediate** threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Analyzing the *Graham* factors without consideration of the *Garner* pre-conditions results in the same conclusion. The crime which precipitated the pursuit was a traffic offense. Despite Scott's argument that Harris was guilty of a myriad of serious criminal offenses, including felonies, during the course of the pursuit, both the District Court and Court of Appeals properly declined to make that determination as a matter of law. Moreover, Harris was only charged with misdemeanor traffic offenses for which he was never prosecuted, and Scott has judicially admitted that the use of force was applied at a time when no other person was immediately endangered by the pursuit. Most significantly, Harris was merely fleeing – not violently resisting arrest. Under both *Garner* and *Graham*, there are clearly genuine issues of material fact as to whether Scott's use of force against Harris was excessive and thus prohibited by the Fourth Amendment.

This analysis was followed in *Vaughan v. Cox*, 343 F. 3d 1323 (11th Cir. 2003), in which the same Court of Appeals held that the defendant officer was not entitled to qualified immunity as a matter of law for the use of deadly force to apprehend a fleeing suspect during a high-speed pursuit. In *Vaughan*, deputies from the CCSD (the same department as Scott) received information that a red pickup truck had been stolen from a service station. After Deputy Cox observed a vehicle matching the description of the stolen vehicle, he attempted to perform a rolling roadblock by positioning his vehicle in front of the truck. While Deputy Cox was positioned in front of the pick-up truck and Deputy Looney was positioned at the rear, Cox

applied his brakes and the truck ran into the back of Cox's cruiser. Cox testified that the impact caused him to momentarily lose control of his vehicle. However, the occupants of the pick-up truck contended that the impact was both accidental and insufficient to cause Cox to lose control. For the purposes of the appeal, the Court of Appeals accepted the occupant's version of events just as this Court must accept Harris' version of events in the instant action.

After the collision, the suspect vehicle did not stop but accelerated. Deputy Cox then got behind the truck, unholstered his sidearm and rolled down the passenger side window. As soon as Cox pulled his vehicle to the side of the fleeing vehicle, the fleeing vehicle accelerated in its same lane of traffic. Cox then testified that the fleeing suspect swerved his vehicle at him and he fired three shots into the vehicle. However, the occupants of the fleeing vehicle testified that they did not swerve at Cox and Cox fired three shots at them without any warning. Given the procedural posture of the case, the court noted that it was obliged to accept the occupants' version of events. The court concluded "that a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup truck" because the fleeing vehicle arguably posed no "immediate threat of serious harm to Deputy Cox, other police officers, or innocent motorists . . . " *Id.* at 1329-1330. On the other hand, the court noted that "Deputy Cox disputes much of Vaughan's version of the events leading up to the shooting," and . . . "[a] jury accepting Cox's assertions could conclude that Vaughan and Rayson presented a serious threat to Cox or others on the road . . . Nonetheless, our obligation at this stage of the proceedings is to view all of the evidence in the light most favorable to

Vaughan." *Id.* at 1331-1332. The same conclusion is demanded by the facts of the case at bar.

The rules on the use of deadly force established by this Court, and applied by the Court of Appeals in both this case and *Vaughan*, are so well understood that they are embodied in nationally accepted standards of the law enforcement profession which provide that "forcible stopping maneuvers" like the ramming of a vehicle at high speed "should be used ONLY in those instances where the application of deadly force would be justified." (R. 45 – Alpert Aff. at 8-9). The model pursuit policy of the International Association of Chiefs of Police (IACP) prohibits their use altogether, stating that "officers may not intentionally use their vehicle to bump or ram the suspect's vehicle in order to force the vehicle to a stop off the road or in a ditch."[9] (*Id.* at 8). Significantly, Scott's expert authored an article entitled "What is a Good Pursuit" which poses a hypothetical situation very similar to the case at bar, and which offers the following conclusion:

> So, under the *Garner* fleeing felon analysis if the officer's ramming of the car is . . . construed as the application of deadly force, then this use of force (seizure) is clearly 'objectively unreasonable.' The ramming officer now has crossed the

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[9] In the order dismissing the writ of *certiorari* in *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257 (1987), the dissent recognized that the IACP specifically acknowledged that ramming a vehicle may only be approved when the use of deadly force was authorized. "See International Association of Chiefs of Police, A Manual of Model Police Traffic Services, Policies and Procedures, Procedure 1.20, p. 91 (1986) ("[B]oxing in, heading off, ramming, or driving alongside the pursued vehicle . . . may be approved only when the use of deadly force would be authorized")." *Id.* at 271, fn. 2.

> line and has violated . . . the Fourth Amendment Constitutional right to be free from unreasonable seizures.

(R. 45, Ex. B – "What is a Good Pursuit").

Based on a proper analysis of the record in the light most favorable to Harris and applying the foregoing precedents, both the District Court and the Court of Appeals correctly found that there are genuine issues of material fact as to whether Scott's actions violated Harris' Fourth Amendment rights. Under the facts in the record, a jury could reasonably conclude that the need to capture a traffic violator does not justify sentencing him to life in a wheelchair, even if that means he gets away, and even if the police are later unable to prove that he was the one driving the car by running his tag number and attempting to arrest him at the house where he has lived his entire life. As reasonable minds can differ as to whether Scott's use of force was objectively reasonable, this matter is left to the sole province of the jury.[10]

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[10] *See, Fisher v. City of Memphis*, 234 F. 3d 312, 317 (6th Cir. 2000); *Posr v. Doherty*, 944 F. 2d 91, 96 (2nd Cir. 1991) (whether the officers believed their use of force was reasonable was properly a jury question); *Trujillo v. Goodman*, 825 F. 2d 1453 (10th Cir. 1987) (inquiry into whether official's use of force was actionable is a factual one depending on the circumstances and in most instances is for the jury); *Bailey v. Andrews*, 811 F. 2d 366 (7th Cir. 1987) (whether officer used excessive force in kicking a suspect was a jury question); *Chew v. Gates*, 27 F. 3d 1432, 1443 (9th Cir. 1994) (whether a particular use of force was reasonable is rarely determinable as a matter of law); *Harvey v. Estes*, 65 F. 3d 784 (9th Cir. 1995) (unreasonable force claims against law enforcement officers are generally questions for the jury); and *Dowdell v. Chapman*, 930 F. Supp. 533 (M.D. Ala. 1996) (reasonableness of force used by law enforcement official under Fourth Amendment's prohibition of excessive force analysis is a question for jury).

II. Clearly established law in 2001 gave fair warning to a reasonable police officer that it is a Fourth Amendment violation to use deadly force to terminate a pursuit by ramming the vehicle of a fleeing traffic offender at a time when the offender poses no immediate threat to human life, and when the offender is merely fleeing and has not violently resisted apprehension at any time during the course of the pursuit.

Since Harris has shown that there are genuine issues of material fact regarding whether Scott violated his Fourth Amendment rights, the next step in the qualified immunity analysis is to determine whether the law was sufficiently clearly established to provide Scott with fair warning that his conduct violated Harris' constitutional rights.

One way to show 'fair warning' is by pointing to a prior case with similar facts, but that is not the only way to do so. *See, e.g., United States v. Lanier*, 520 U.S. 259, 271 (1997) (citing *Anderson v. Creighton*, 483 U.S. 635, 640) (recognizing that a general constitutional rule "identified in the decisional law" may apply with "obvious clarity to the specific conduct in question," even though the challenged conduct has not previously been held unlawful); *see also Hope v. Pelzer*, 536 U.S. 730, 739 (2002). A "rule already identified by the decisional law" can even be derived from dicta in view of *Hope*'s reliance upon "the reasoning, but not the holding," of prior litigated cases. 536 U.S. at 743. In order for the law to be clearly established, it is not necessary to show that "the very action in question has been held unlawful, but it is to say that *in light of pre-existing law* the unlawfulness must be *apparent*. *Anderson*, 483 U.S. at 640 (emphasis added).

Therefore, the "salient question" before this Court is whether the contours of the law which existed on March 29, 2001, were sufficiently clear to give a reasonable law enforcement officer "fair warning" that he could be liable for deliberately ramming a police car into a car driven by a fleeing traffic offender when the fleeing offender posed no immediate risk to the life and safety of the officer or others. *Hope*, 536 U.S. at 741 (citing *Lanier*, supra). While Scott argues that the holdings of the *Garner/Graham/Brower* trilogy are couched in general terms which are too vague to clearly establish the law in this case, Harris submits that these cases articulate an unambiguous rule which applies "with obvious clarity" to this case. *Lanier*, 520 U.S. at 271. The Court's rulings in *Garner*, *Graham* and *Brower* are not limited by their terms to the specific facts of those cases – rather, they clearly and succinctly define the limits of force allowable under the Fourth Amendment.

Harris submits that this Court's rulings in *Garner*, *Graham* and *Brower* clearly establish protections embodied by the Fourth Amendment, to wit: 1) deadly force may not be used to apprehend a fleeing offender unless the offender places the officer or others in immediate danger of death or serious bodily injury; and 2) any use of force by officers – deadly or otherwise – must be proportional to the threat posed by the offender. These principles apply with obvious clarity to the facts of this case and place Scott on notice that his conduct violated this clearly established law. The undisputed facts in the record reveal that: 1) Harris was being pursued for a simple traffic offense; 2) Scott used deadly force when he rammed Harris in an effort to apprehend him; and 3) at the time that Scott used

deadly force, no one was in immediate danger of being harmed.

This is the same analysis which the Court of Appeals applied in *Vaughan v. Cox*, 343 F. 3d 1323 (11th Cir. 2003), a case in which another Coweta County officer used deadly force to terminate a high-speed pursuit – three (3) years prior to the incident in this case. Noting *Hope*'s admonition that courts "should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration," the court held that the state of the law in 1998 gave the officer "fair warning" that his alleged conduct was unconstitutional. *Hope*, 536 U.S. at 741.

> In this case, the danger presented by Vaughan and Rayson's continued flight was the risk of an accident during the pursuit. Applying *Garner* in a common-sense way, ***a reasonable officer would have known*** that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to summary judgment, on qualified immunity grounds, regarding Vaughan's § 1983 claim predicated on the Fourth Amendment.

343 F. 3d at 1332-1333 (emphasis added). Likewise, a reasonable officer would know that ramming a vehicle at 80 to 90 mph on a two-lane road and knocking it off an embankment also "transform[s] the risk of an accident . . . into a virtual certainty" – with similarly "foreseeable consequences." *Id.* Under these circumstances, a reasonable officer would make no distinction between deadly

force through the use of a firearm and deadly force through the ramming of a vehicle.

Scott argues that the only way that Harris could prove that the law was clearly established is to show that, prior to March 29, 2001, a previous case holding an officer liable for violating the Fourth Amendment by finding that making intentional direct contact with a fleeing motorist at high speeds constituted the improper use of deadly force.[11] This argument flies squarely in the face of *Hope* and *Lanier*, where the Court made clear that factually identical precedent is not required where prior rulings give fair warning of constitutional liability. While Scott does not precisely specify what aspect of the law he contends is not clearly established by the previously cited cases, a more particularized analysis of the case law as it existed on March 29, 2001 reveals that the law was sufficiently clear to place Scott on notice that his conduct violated Harris' constitutional rights as far back as the 1980's.

Prior to this incident it was clearly established that an automobile can be utilized as an instrument of deadly force.[12] Even before this Court decided in *Brower v. County*

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[11] In *Lewis v. Brown*, 250 F. 3d 751 (11th Cir. 02/14/01) (table), the Court of Appeals affirmed the denial of qualified immunity to an officer who rammed a suspected speeder. The facts of this case were discussed in *Alderman v. McDermott*, No. 6:03CV41ORL22KRS, 2004 WL 1109541 at 13-14 (M.D. Fla. 01/27/04).

[12] *Smith v. Freeland*, 945 F. 2d 343, 347 (6th Cir. 1992); *Galas v. McKee*, 801 F. 2d 200, 203 (6th Cir. 1986); *United States v. Aceves-Rosales*, 832 F. 2d 1155, 1157 (9th Cir. 1987); *Acosta v. City and County of San Francisco*, 83 F. 3d 1143, 1147 (9th Cir. 1996); *Robinette v. Barnes*, 854 F. 2d 909, 911-912 (6th Cir. 1988); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991).

of Inyo, 489 U.S. 593 (1989) that deliberately causing a suspect's vehicle to crash could rise to the level of a Fourth Amendment violation, the Sixth Circuit noted in *Robinette v. Barnes*, 854 F. 2d 909, 912 (6th Cir. 1988):

> In *Garner*, a police officer seized an unarmed, fleeing burglary suspect when he shot and killed him. Thus, the deadly force in issue in that case was the kind which undoubtedly comes to mind first, a firearm. ***However, many law enforcement tools possess the potential for being deadly force, including*** a state university police officer's nightstick, [citation omitted] and ***a police officer's vehicle.***

854 F. 2d at 912 (emphasis added). Earlier still, *Galas v. McKee*, 801 F. 2d 200 (6th Cir. 1986), noted as follows:

> Without question, high speed pursuits place the suspect, the officer, and the public in general risk of death or serious bodily injury. ***In that respect high-speed pursuits are no different than the use of firearms to apprehend fleeing suspects.***

801 F. 2d at 203 (emphasis added).

Also before *Brower*, it was noted in the dissent to the Court's Order dismissing the writ of *certiorari* in *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 271 fn. 2 (1987) that nationally recognized law enforcement standards indicate that ramming the vehicle of a fleeing suspect was only a proper tactic under circumstances when deadly force was authorized. That footnote contained the following citation: "See International Association of Chiefs of Police, A Manual of Model Police Traffic Services, Policies and Procedures, Procedure 1.20, p. 91 (1986) ("[B]oxing in, heading off, ramming, or driving alongside the pursued

vehicle . . . may be approved only when the use of deadly force would be authorized"). This reference to model law enforcement po'ices was not an isolated occurrence since the Court has considered policies, standards, and reports as evidence of whether the law is clearly established for qualified immunity purposes on other occasions. *See Wilson v. Layne*, 526 U.S. 603 (1999) (policies of United States Marshal Service); *Hope v. Pelzer*, supra (state departmental regulations and a Department of Justice report).

In arguing that the law was not clearly established, Scott cites a number of cases which ultimately granted qualified immunity to officers who had used deadly force to terminate a chase. (Petitioner's Brief, pp. 27-28). However, an examination of these cases reveals that all the cases cited by Scott analyzed the officer's use of deadly force under the *Garner/Graham* analysis discussed herein. Therefore, it is ironic that Scott suggests that this analysis does not apply with obvious clarity to this case. Properly analyzed, the reasoning of the cases cited by Scott all support Harris' argument that Scott's use of deadly force to terminate the chase by ramming Harris' car while no other persons were in immediate danger was unconstitutional under clearly established law.

In *Smith v. Freeland*, 954 F. 2d 343 (6th Cir. 1992), a fleeing suspect drove off the road during the course of a pursuit. *Id.* at 344. After the officer thought the fleeing vehicle had become stuck, the officer moved his vehicle in close proximity to the fleeing vehicle. However, the fleeing vehicle accelerated rapidly and swerved toward the police officer. After the officer took evasive action, the fleeing vehicle again swerved at the police officer and then attempted to flee. The pursuit continued until the fleeing

suspect went down a dead-end street. At the end of the dead-end street, the fleeing suspect attempted to turn around in a citizen's yard. As the fleeing suspect made this turning movement, the officer attempted to block the fleeing suspect. When the officer placed his car in front of the fleeing suspect's vehicle, there was a local swimming pool to his back and a gate to his side. *Id.* Thinking that the pursuit was over, the officer exited his patrol car to apprehend the suspect. However, the fleeing suspect backed up his vehicle and smashed through the gate. As the suspect's car was attempting to pass the police vehicle, the officer fired one shot which killed the suspect. *Id.* Analyzing those facts under *Garner* and *Graham*, the court found that the officer's use of deadly force was reasonable under the Fourth Amendment due to the immediate danger that the suspect posed to the officer and public at the time of the shooting. *Id.* at 345-347.

Similarly, in *Scott v. Clay County*, 205 F. 3d 867 (6th Cir. 2000), the fleeing suspect raced through a stop sign at an intersection, weaved off the pavement and took a turn at high speeds resulting in an officer deciding to initiate a pursuit. During the pursuit, the fleeing suspect narrowly missed hitting another officer who was outside of his patrol car. *Id.* at 872. The pursuit ranged at speeds of 85 to 100 mph and lasted over 20 minutes. The fleeing suspect admitted that he specifically drove at least one motorist off the road. During the chase, the fleeing suspect lost control of his vehicle and crashed into a guard rail. As the officer exited his vehicle, the suspect accelerated at the officer who was forced to jump out of the way. As the fleeing suspect attempted to get back on the highway he drove his vehicle at an approaching officer's car. The original pursuing officer shot at the vehicle, striking the passenger.

Holding that the officer was entitled to qualified immunity under the *Garner/Graham/Brower* analysis, the court concluded that the officer's use of deadly force was reasonable because the undisputed facts indicated that the fleeing suspect: 1) had committed serious, life-threatening crimes; 2) was an immediate threat to the officer; and 3) was actively resisting arrest. *Id.* at 876-878.

In *Cole v. Boone*, 993 F. 2d 1328 (8th Cir. 1993) the fleeing suspect was driving a tractor-trailer at speeds up to 90 mph, passed traffic on both shoulders of the highway in heavy traffic and attempted to ram several police cars. *Id.* at 1330. The pursuing officers attempted a rolling roadblock but were unsuccessful. Thereafter, the officers shot the tires of the tractor-trailer with a shotgun which was successful, but failed to stop the vehicle. The officers set up a roadblock which left an escape route in case the fleeing suspect refused to stop. The fleeing suspect ran through the roadblock, but the officers were able to shoot holes in the radiator and tires. After a more than 50-mile pursuit which forced no less than 100 cars off the road and during which the fleeing suspect repeatedly attempted to ram police cars, the officer shot the driver to terminate the pursuit. *Id.* at 1331. In analyzing the constitutional liability of the officers, the court applied the *Garner/Graham* analysis. Based on the violent resistance of the fleeing suspect, the court easily found that the use of deadly force by the officer was reasonable. *Id.* at 1333-1334.

The most interesting case cited by Scott in support of his argument is *Weaver v. State*, 63 Cal.App.4th 188 (Cal.App. 1998). In *Weaver*, a 14-year-old driving a stolen car threw what were believed to be drugs out of the car and led police officers on a wild, two-hour chase over

freeways and through residential areas, even ramming a police vehicle. As the fleeing suspect was circling through residential streets, so many bystanders had come out of their houses that the pursuit route resembled a parade route. *Id.* at 208. Throughout the pursuit, the pursuing officer considered using the PIT maneuver but felt that the conditions were not right. *Id.* at 194. According to the officer, the PIT maneuver could not be used safely at speeds over 35 mph. *Id.* at 195. The officer further testified that the PIT maneuver is not intentional crashing or ramming. *Id.* However, after two hours of pursuit, the officer executed a PIT maneuver on the fleeing suspect at a point of the pursuit route where no pedestrians or motorists were present, causing the suspect to suffer serious injuries. The officer testified that he was traveling no more than 35 mph when he performed the PIT, but according to an accident report completed by another officer using aerial videotapes, the PIT was performed at a speed of 47-49 mph. *Id.* at 95. The plaintiff's expert opined that if the officer was traveling over 35 mph when he performed the PIT maneuver, it would have been an application of deadly force. *Id.* at 198-199.

Reviewing that record under the *Garner/Graham/Brower* analysis, the *Weaver* court acknowledged that the dispute over the speeds of the vehicles (35 mph vs. 45-47 mph) created a genuine issue of material fact as to whether the PIT maneuver was the application of deadly force. *Id.* at 207-208. However, based on the prolonged nature of the pursuit and the aggressive driving of the fleeing suspect – which included the ramming of a patrol car – the court held that the use of the PIT maneuver in this case was reasonable under the Fourth Amendment even if it was found to be deadly force. *Id.* at 207.

Harris submits that the cases offered by Scott provide no support for the argument that the law was insufficiently developed to provide Scott with fair warning that his conduct violated the Fourth Amendment. In fact, the reasoning of these cases clearly supports Harris' position that the *Garner/Graham/Brower* trilogy provides the proper analysis of the case at bar – both in determining whether a constitutional violation occurred (under the first prong of *Saucier*) and whether the law was clearly established (under the second prong). Immunity was granted in the cases cited by Scott – not because of any lack of clarity in the governing law – but because the application of clearly established law to the undisputed facts illustrated that the officers' conduct was reasonable under a *Garner/Graham/Brower* analysis.

Harris submits that these cases illustrate that the state of the law in 2001 was sufficiently developed to provide Scott with fair warning that his conduct violated Victor Harris' clearly established Fourth Amendment rights because these cases all determined that an officer's application of deadly force to terminate a pursuit is governed by *Garner/Graham/Brower.* Therefore, this trilogy of cases applies with obvious clarity to this case and clearly establishes the applicable law. At a minimum, these cases serve to further clarify that the holdings of *Garner/Graham/Brower* apply to cases where force is used to terminate a pursuit.

Scott also argues that the cases of *Adams v. St. Lucie County Sheriff's Dep't*, 998 F. 2d 923 (11th Cir. 1993) (*en banc*) (per curiam) and *Donovan v. Milwaukee*, 17 F. 3d 944 (7th Cir. 1994) support his argument that he is entitled to qualified immunity. However, Scott fails to point out that the incidents in these cases occurred before the decision in

Brower clearly established that using a police vehicle to terminate a pursuit through a roadblock or an intentional sideswiping was a Fourth Amendment seizure. While those two cases held that the officers were entitled to qualified immunity, both courts made this determination based on the fact that *Brower* had not yet been decided, rejecting the argument that *Garner*, standing alone, could clearly establish that a seizure had occurred under the facts of those cases.

Significantly, the Court of Appeals did not decide *Adams*[13] on the basis of whether the officer's ramming of the plaintiff's vehicle amounted to a constitutional violation. The court simply held that the law was not clearly established that ramming a vehicle during the course of a pursuit was a "seizure." Because the basis upon which immunity was granted was that the conduct had occurred before *Brower* clearly established the law, the *en banc* dissenters made certain to point out that "after this opinion, the law is clearly established that law enforcement officers may not use deadly force to apprehend a fleeing misdemeanant." 998 F. 2d at 923. Based on this statement, there can be no dispute that the relevant law was clearly established because Scott applied deadly force upon a fleeing misdemeanant at a time when he posed no immediate threat. Unlike the defendants in *Adams* and *Donovan*, Scott cannot argue in the wake of *Brower* that his conduct was not a Fourth Amendment seizure under

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[13] It should also be noted that *Adams* was decided under prior Eleventh Circuit precedent which required the plaintiff to "prove the existence of a clear, factually defined, well-recognized right of which a reasonable officer would know." *Adams*, 962 F. 2d at 1574. That rigid 'gloss' on the qualified immunity standard was invalidated in *Hope*, supra.

clearly established law, nor does he even attempt to argue that the law is not clearly established on that point.

Finally, Scott argues that this Court's decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004) entitles him to qualified immunity as a matter of law. In *Brosseau*, the Court did not discuss whether the officer's conduct violated the Constitution. Instead, the Court went straight to the second prong of *Saucier* and held that the officer was entitled to qualified immunity because it was not clearly established that shooting a violent suspect who was attempting to flee in a vehicle and posed a serious risk to persons in the **immediate** area was unconstitutional. Again, Scott attempts to latch on to the holding of the cause without any consideration of the factual circumstances of the case. Just as this Court distinguished *Garner* in deciding *Brosseau*, the Court of Appeals made clear that the case at bar is distinguishable from *Brosseau* and is governed by *Garner*. Both *Garner* and the case at bar involve fleeing suspects who were not violently resisting arrest. *Brosseau* is different because it involved a suspect who was violently resisting arrest.

Unlike Harris, the fleeing offender in *Brosseau* was a felony suspect with a no-bail warrant out for his arrest with whom Officer Brosseau had a violent physical encounter prior to the shooting. Believing that the suspect, Mr. Haugen, had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity – the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere nearby), a woman

and her three-year-old child in a small vehicle parked directly in front of the Jeep and four feet away, and two men in a parked vehicle 20 to 30 feet away.

Prior to using deadly force, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit him in an attempt to get the keys. In granting qualified immunity, the Court held that *Garner* did not provide a reasonable officer with fair notice of a Fourth Amendment violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, *when persons in the immediate area are at risk from that flight.*" *Id.* at 200 (emphasis added).

Those facts are not comparable to this case. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an *immediate* risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. Unlike the situation in *Brosseau*, the parties herein were not in close physical proximity nor had they been engaged in a violent, one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from *behind in their squad cars.* At the time of the ramming, Harris was driving in a non-aggressive fashion – i.e., without trying to ram or run into the officers or others. Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a *residential* neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show

little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections by the PCPD. Finally, Scott issued absolutely no warning (over the loudspeaker or otherwise) prior to using deadly force. Therefore, Scott's reliance on *Brosseau* in support of his claim for qualified immunity is misplaced.

Post-*Brosseau* cases do not support Scott's argument that *Brosseau* entitles Scott to qualified immunity. In *Sigley v. City of Parma Heights*, 437 F. 3d 527 (6th Cir. 2005) an officer shot and killed a suspect attempting to flee in a vehicle after an undercover drug buy. Whether the officer was in danger from the flight was hotly contested. *Id.* at 532-533. The officer contended that the plaintiff was driving his vehicle at the officer at the time of the shooting while the plaintiff's witnesses testified that the officer was running after the plaintiff's vehicle at the time of the shooting. Analyzing the facts under *Garner* and *Graham*, the court denied qualified immunity by distinguishing *Brosseau*, noting that the *Garner* pre-conditions that were present in *Brosseau* were not present. The court noted that the officer in *Brosseau* believed the fleeing suspect was retrieving a gun and posed a grave threat to the officers and citizens in the immediate area, while the officer in *Sigley* (viewed in the light most favorable to the plaintiff) was not in danger and was running after the fleeing suspect when the fatal shots were fired. *Id.* at 537. Therefore, the court held that whether qualified immunity applied depended on which version of the facts the jury believed. As such, the officer was not entitled to qualified immunity under clearly established law.

In another post-*Brosseau* case, *Smith v. Cupp*, 430 F. 3d 766 (6th Cir. 2005), the court denied qualified immunity to an officer who used deadly force to apprehend a fleeing suspect under far more egregious facts. In *Smith*, an officer arrested a suspect for placing harassing telephone calls, handcuffed him and placed him in the back seat of the squad car. *Id.* at 769. However, the officer's vehicle was not equipped with a safety partition. After the officer left his vehicle to speak with a tow truck operator, Smith jumped the seat and attempted to drive away in the patrol car. The facts of Smith's actions are strongly disputed. The officer testified that Smith drove the police vehicle at both the officer and tow truck operator. Smith contends that the officer fired the fatal shots after the vehicle had passed the officer and the tow truck operator when no one was in immediate danger. *Id.* at 770-771. Again, the court analyzed the facts under *Garner/Graham*, distinguishing *Brosseau* and holding that the facts when viewed in the proper light created a genuine issue of material fact as to whether the use of deadly force violated *Garner*, precluding summary judgment on qualified immunity grounds. *Id.* at 773-775.

Finally, the same district court which originally handled the *Brosseau* case recently had occasion in *Hayes v. Wickert*, No. C06-54012RJB, 2006 WL 3373051 (W.D. Wash. 11/20/06), to evaluate a case involving the use of deadly force to terminate a pursuit.[14] In *Hayes*, an officer

[14] It should be noted that this district court had found that Officer Brosseau was entitled to qualified immunity, which was reversed by the Ninth Circuit only to have the district court's finding of qualified immunity ultimately reinstated by this Court. Given the court's finding of immunity in *Brosseau*, its analysis in *Hayes* is compellingly persuasive.

commenced a chase of a traffic offender and ultimately resorted to the use of deadly force. The facts of the shooting were contested. The officer claimed that the suspect attempted to drive his vehicle at the officer after the officer exited his vehicle when the officer thought the fleeing vehicle was stuck. However, the plaintiff alleges that after his vehicle became stuck in a ditch, the officer simply got out of his car and shot him without warning. *Id.* at 1. In addressing whether the officer was entitled to qualified immunity, the court analyzed the facts under *Garner/Graham* and found that factual disputes existed which precluded the entitlement to qualified immunity as a matter of law. In addressing *Brosseau* and whether the law was clearly established at the time of the shooting, the court held:

> Under the circumstances alleged, a reasonable officer would have had fair notice that shooting an individual suspected of violating traffic laws and eluding police was unlawful. There are issues of fact as to when Plaintiff began backing his car, and if Plaintiff ['s] version of events is believed, Officer Wickert jumped out of his patrol car and immediately began firing shots. Under those circumstances, Officer Wickert could not reasonably have believed his safety was endangered, and would have fair notice that shooting Plaintiff was unlawful. Moreover, unlike in *Brosseau*, or the other cases cited by Officer Wickert, the record does not contain evidence that there were others in the area whose safety was immediately threatened. A reasonable officer, under the facts alleged by Plaintiff, would have reasonable fair notice that shooting the Plaintiff here was unlawful.

Id. at 6.

While Scott's argument completely disregards the factual record in this case in analyzing his entitlement to qualified immunity as a matter of law, it is clear that both the District Court and the Court of Appeals appropriately determined that genuine issues of material fact exist regarding whether Scott violated Victor Harris' clearly established Fourth Amendment rights. Given the limitations on the use of deadly force that arise under the rule of *Garner* and its progeny – a rule which applies with obvious clarity to the case at bar – the law was sufficiently developed to provide Scott with more than 'fair warning' that his conduct violated Harris' constitutional rights. While Scott appears to be arguing that he is entitled to qualified immunity unless the exact conduct he engaged in was previously held unlawful, that approach was specifically rejected in *Hope* and *Lanier*. At the time of this incident, any objectively reasonable officer would have known that ramming a fleeing suspect at high speeds constituted a seizure by deadly force, and accordingly, it could only be justified under circumstances authorizing the use of deadly force against a fleeing suspect. This much was acknowledged by Scott, who simply argues that his use of deadly force was reasonable under the circumstances – despite the fact that he used deadly force against a nonviolent misdemeanant who was merely fleeing. Based on the record, there are clearly questions which must be resolved by a jury before the questions of qualified immunity can be resolved as a matter of law. Therefore, this case must be remanded to the District Court for trial.

CONCLUSION

Based on the foregoing argument and authority, the Writ of *Certiorari* should be dismissed as improvidently granted, or, alternatively, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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